Supreme Court, U.S.
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No. 99-1969

IN THE

Supreme Court of the United States

JACOBO XACUR, FELIPE XACUR, JOSÉ MARIA XACUR,

Petitioners,

v.

BANCO NACIONAL DE MEXICO S.A.; BANCOMER S.A.; BANCO MEXICANO S.A.; BANCA SERFIN S.A.; BANCO BILBAO VIZCAYA — MEXICO S.A.; CONFIA S.A.; BANCO INVERLAT S.A.; CALIFORNIA COMMERCE BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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Jacobo Xacur, Felipe Xacur, and José Maria Xacur (collectively, the "Xacurs") respectfully submit this their Reply Brief.

I.

REPLY TO RESPONDENTS' "CORRECTION OF MISSTATEMENTS IN THE PETITION"

Respondents contend that the Xacurs are incorrect in asserting that any of the Banks have admitted the validity of any claim of usury. (Resp. Opp. at 5).[1] Banamex USA Bancorp has in fact admitted that the rates of interest stated in the pagares exceeded that permitted by Texas law. Moreover, Dario Oscos, chief litigation counsel for Banamex, admitted the rates of interest set forth in the Xacurs' Petition for Writ of Certiorari. (Pet. at 14-15).[2]

Notwithstanding the Respondents' expert witness' attempt to qualify or reform his testimony, there is no question that the Respondents' expert admitted that at least one Mexican court has found that the action against the avalistas follows the same chance (or "destiny") as that of the maker. (Pet. at 9).

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1. Citations to "Resp. Opp." refer to Respondents' Brief in Opposition.

2. Citations to "Pet." refer to the Xacurs' Petition for Writ of Certiorari.

II.

REPLY TO RESPONDENTS' "REASONS FOR DENYING THE WRIT"

A. The Debts Are Contingent.

Contrary to the Respondents' arguments, Article 114 of the Mexican Negotiable Instruments Law does not supplant, but is controlled by Article 116 of the Mexican Negotiable Instruments Law. (Resp. Opp. at 9). Article 116 states that "[t]he action against the avalista will be subject to the same terms and conditions to which the action against the avalado [primary maker] is subject." (Pet. at 12; App. E to Pet. at 41a). The Respondents further admit that at least one Mexican civil court had ordered the accumulation of Confia S.A.'s claims against the Xacurs and the Xacur Companies into the suspension of payments proceedings. (Resp. Opp. at 10). Notwithstanding his acknowledgment of the Mexican court's order, the Respondents' expert opined that the court was in error and did not reflect Mexican law. (*Id.*)

The Respondents' reliance on *Summers v. Guss*, 7 F. Supp. 2d 237 (W.D.N.Y. 1998) for the proposition that a "Mexican aval" is an unconditional guaranty is also misplaced. (Resp. Opp. at 11.) In fact, *Summers* merely recites language from *Banco Nacional de Costa Rica v. Bremar Holdings Corp.*, 492 F. Supp. 364, 366 (S.D.N.Y. 1980). As noted in the Xacurs' Petition for Writ of Certiorari, *Bremar* does not stand for the proposition that a Mexican aval is an unconditional guarantee. (Pet. at 12).

B. The Debts Are Subject to a Bona Fide Dispute.

Based on the Fifth Circuit's recent decision in *Southwest Livestock & Trucking Co. v. Ramon,* 169 F.3d 317 (5th Cir. 1999), Respondents contend that the Xacurs' alleged debts are not subject to dispute. In that case the Fifth Circuit refused to apply Texas usury law to invalidate a Mexican judgment. (Resp. Opp. at 12). *Southwest Livestock* is distinguishable, however, because this case does not involve a judgment from a Mexican court. Where a Mexican court has rendered judgment based upon a note executed in Mexico and governed by Mexican law, Texas public policy concerns regarding usury are significantly different from those in this case where Mexican banks seek to use the U.S. court system to enforce obligations arising under Mexican law. Accordingly, *Southwest Livestock* is inapposite. It is incongruous that the Respondents argue the Xacurs are subject to United States jurisdiction and bankruptcy laws, yet simultaneously urge that Texas public policy does not apply to business transacted in Mexico.

III.

REPLY TO RESPONDENTS' CONTENTION THAT THE LOWER COURTS PROPERLY CONSIDERED THE XACURS' ARGUMENTS

Respondents assert that the Xacurs' complaint "rings hollow" because they only devoted six pages of their Fifth Circuit Brief to the issues of contingency and bona fide dispute. (Resp. Opp. at 13). Respondents acknowledge that two issues raised by the Xacurs in the Fifth Circuit concerning the exercise of jurisdiction and abstention based on comity principles are not before

this Court. (Resp. Opp. at 2). Given the page and character limitations imposed by the Fifth Circuit coupled with the fact that the Xacurs raised numerous other issues in the lower court, the Xacurs should not now be criticized in this Court for the limited number of pages allocated to arguments in their Fifth Circuit brief.

In addition, Respondents apparently contend that because the Xacurs "received a full evidentiary hearing in the bankruptcy court," their petition for certiorari should be denied. (Resp. Opp. at 13). Similarly, Respondents urge that oral argument before the Fifth Circuit and that court's opinion that it had "carefully considered this appeal" (notwithstanding a five sentence per curiam opinion) supports denial of the Xacurs' petition. (*Id.*) Applying those standards, no litigant would ever successfully petition this Court to grant its petition for writ of certiorari.

CONCLUSION

The Fifth Circuit erred as a matter of law in concluding that the Xacurs' debt is not contingent or subject to a bona fide dispute. The writ of certiorari should be granted and the orders for relief should be vacated.

Respectfully submitted,

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